Kenneth Fook Mun Lee v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–23 OF 2005(W)
AHMAD FAIRUZ CHIEF JUSTICE, PS GILL AND RICHARD MALANJUM FCJJ
9 JUNE 2006

Criminal Law — Penal Code — s 300(d) — Murder — Knowledge limb — Defence of intoxication — Whether defence of intoxication under s 86(2) of the Penal Code applicable to murder under s 300(d) of the Penal Code — Whether intoxication would negate the knowledge requirement under s 300(d) — Penal Code ss 86(2), 300

Criminal Procedure — Defence — Intoxication — Application of — Whether intoxication would only apply where the mens rea is intention — Whether intoxication would apply where the mens rea is knowledge — Penal Code s 86(2)

Criminal Procedure — Defence — Intoxication — State of mind of accused, how determined — Whether intoxication an unqualified exception or excuse for offence requiring intention, specific or otherwise — Penal Code s 86(2)

Criminal Procedure — Fact, finding of — Interference by appellate court — Whether warranted — Exceptions to general rule

Criminal Procedure — Mens rea — Intention — Intoxication, defence of — Whether intoxication an unqualified exception or excuse for offence requiring intention, specific or otherwise — Penal Code s 86(2)

Criminal Procedure — Mens rea — Knowledge — Whether intoxication would negate knowledge as mens rea for murder under s 300(d) of the Penal Code — Whether intoxication would only negate specific or other intention — Penal Code s 86(2)

Criminal Procedure — Trial — Duty of court — Consideration of defence — Whether open to trial court to consider probable defence before conclusion of trial

The accused was charged in the High Court with murder punishable under s 302 of the Penal Code. At the close of the case for the prosecution, the High Court judge ruled that the prosecution had made out a prima facie case of murder under s 300(d) of the Penal Code. In so ruling, the judge was satisfied that the twin requirements

under cl (d) to s 300 of the Penal Code had been established — despite the testimony of prosecution witnesses that the accused could have been drunk at the material time. At the close of the prosecution's case, the judge had also considered the probable defence of intoxication notwithstanding the fact that it was not raised during the prosecution's case. The sole defence relied upon by the accused was automatism by reason of hypoglycaemic attack at the material time. However, at the end of the defence case, the judge rejected the defence of hypoglycaemic attack and was instead satisfied that on a balance of probabilities, the accused was intoxicated at the material time. This was despite the fact that the allegation of drunkenness was contradicted by some of the witnesses for the defence — including the accused himself. The judge proceeded to find that although the intoxication had negated the requisite intention, nevertheless the facts were sufficient to establish a case under s 304(b) of the Penal Code. The High Court thus found the accused guilty of an offence under s 304(b) of the Penal Code and sentenced him to eight years' imprisonment from the date of arrest. The prosecution appealed to the Court of Appeal and the accused cross appealed. The Court of Appeal reversed the decision of the High Court, found the accused guilty of murder and sentenced him to death. The accused appealed to the Federal Court.

Held, dismissing the appeal, and affirming the conviction and sentence of the Court of Appeal:

(1) It is not the function of a trial court before the conclusion of a trial to consider the probable defence, let alone to speculate — more so in the instant case when it (the defence of intoxication) was not raised during the case for the prosecution and where the trial judge had called for the defence on a charge of murder. To do so would not be in consonant with the relevant provisions in the Criminal Procedure Code. In an appropriate case a finding on intoxication may be made at the close of the case for the prosecution, especially where s 86(2) of the Code — which requires intoxication to be taken into account for the purpose of determining the existence of intention — is relevant. This was not such a case. Here, the trial judge had called for the defence as per the charge at the close of the prosecution's case; the trial judge had relied on s 300(d) of the Code (the 'knowledge limb') for the mens rea of murder despite the testimony of prosecution witnesses that the accused could have been drunk at the material time; the allegation of drunkenness was contradicted even during the defence's case (see paras 5–6).

(2) Section 86(2) of the Penal Code only affects offences which require intention, specific or otherwise. It excludes other types of mens rea. Since cl (d) to s 300 of the Penal Code, involves merely knowledge and not intention, it is not within the ambit of s 86(2). Intoxication is thus irrelevant in securing a conviction for murder if knowledge as per cl (d) of s 300 of the Penal Code is proved beyond reasonable doubt by the prosecution. Although such conclusion may appear preposterous, it is the current legal position (see para see para 30); *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338 followed.

(3) Where intoxication is in issue, the process of determining the state of mind of an accused person at the time of commission of the offence for which he is

charged should be by way of inferences from the known relevant facts and on the totality of the surrounding circumstances including his conduct at the material time and taking into account the evidence of his intoxicated state. The application of s 86(2) requires that if there is evidence of intoxication before a trial judge, he should take such fact into account and determine whether it is weighty enough to leave him with a reasonable doubt about the accused person's guilty intent. Section 86(2) and hence intoxication should not be construed as providing an unqualified exception or excuse for an offence which requires intention, specific or otherwise (see paras 33–34).

(4) In the instant appeal, affirming the approach adopted by the trial judge in determining mens rea when intoxication is in issue would tantamount to side-stepping cl (d) as one of the elements of mens rea for the offence of murder. It would mean that on a charge for murder where the defence is intoxication an accused person does not have to be concerned with cl (d) and may conveniently disregard its existence. Such an approach would firstly render s 85 of the Penal Code otiose. Secondly, it might even be perceived as a license to commit murder under the cover of intoxication (see para 35); *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338 followed.

(5) The Federal Court could not agree with the approach undertaken by the trial judge when he said that 'the court must first make a finding on the relevant mens rea before embarking on a consideration of the defence of intoxication' vis-à-vis s 86(2). The purpose of proved intoxication envisaged in s 86(2) is quite apart from the defence of intoxication under s 85(2) (see para 42).

(6) Clause (d), being one of the categories of mens rea for the offence of murder as defined under s 300 of the Code, should not be disregarded even if s 86(2) is raised. This is because under s 86(2), the fact of intoxication is only a circumstance to be taken into account in proving intention where the mental element of an offence is one of intention, specific or otherwise. If knowledge is the required mental element s 86(2) does not apply. A plain literal interpretation of cl (d) under s 300 of the Code allows no other reasonable meaning other than knowledge is another element of mens rea for the offence of murder (see paras 43–44).

(7) If the High Court judge had maintained the course that he took at the end of the case for the prosecution, his final verdict might have been similar to that of the Court of Appeal. Upon rejection of the sole defence — automatism by reason of hypoglycaemic attack and with s 86(2) only applicable to the first three categories, the verdict would have been quite obvious. This was subject of course to the prosecution proving all the elements for the offence of murder including the prerequisites to be established under cl (d) of s 300 beyond reasonable doubt. There was thus no merit in the contention of the counsel for the accused that the defence should not have been called at the close of the case for the prosecution (see paras 45–46).

(8) An appellate court should indeed be slow in interfering with the finding of fact by a trial court. However, there are certain qualifications such as where there is clear justification for doing so or where the finding of the trial court relates to an inference by the trial court — in which case the appellate court would

be in a equally good position as the trial judge to make such determination. In the instant appeal, although the Court of Appeal interfered with the finding of the trial judge, the interference was more in the nature of an interference on the inferences to be given from the proved set of facts in which case the Court of Appeal would have been in an equally good position as the trial judge to make such determination (see paras 48–49).

(9) In the instant appeal, the Federal Court would agree with the inferences made by the Court of Appeal. The conclusion of the Court of Appeal was more tenable. There was no justification in finding that the accused was unfairly and unjustly prejudiced by the inferences made by the Court of Appeal. There was also no reason to find that the decision of the Court of Appeal was erroneous in law and in fact (see paras 53–55).

(10) Clause (d) of s 300 of the Penal Code should not have been omitted by the trial judge in his overall consideration of the case simply on the basis that intoxication was in issue and s 86(2) could be invoked (see para 58).

[Bahasa Malaysia summary

Tertuduh dituduh di Mahkamah Tinggi dengan kesalahan membunuh yang boleh dihukum di bawah s 302 Kanun Keseksaan. Pada akhir kes pendakwa raya, hakim mahkamah tinggi memutuskan bahawa pendakwa raya telah membuat satu kes pembunuhan prima facie di bawah s 300(d) Kanun Keseksaan. Dalam memutuskan sedemikian, Hakim berpuas hati bahawa keperluan berkembar di bawah klausa (d) kepada s 300 Kanun Keseksaan dibuktikan – walaupun terdapat testimoni saksi-saksi pendakwa raya yang mengatakan yang tertuduh mungkin mabuk pada masa matan. Pada akhir kes pendakwa raya, Hakim juga telah menimbang kemungkinan pembelaan mabuk walaupun ianya tidak dibangkitkan semasa kes pendakwa raya. Datu-satunya pembelaan yang digunakan oleh tertuduh adalah hanya automatisme kerana serangan hypoglycaemic pada masa matan. Walau bagaimanapun, pada akhir kes pembelaan, Hakim telah menolak pembelaan serangan hypoglycaemic dan sebaliknya berpuas hati pada imbangan kebarangkalian, tertuduh adalah mabuk pada waktu matan. Walaupun ini adalah bertentangan dengan setengah saksi pihak pembelaan – termasuk tertuduh sendiri. Hakim seterusnya memutuskan bahawa walaupun keadaan mabuk telah menafikan niat, namun begitu terdapat fakta-fakta yang mencukupi untuk membuktikan kes di bawah s 304(b) Kanun Keseksaan. Mahkamah Tinggi kemudiannya mendapati tertuduh bersalah di bawah s 304(b) Kanun Keseksaan dan memberikan hukuman lapan tahun penjara dari tarikh beliau ditahan. Pendakwa raya merayu ke mahkamah rayuan dan tertuduh merayu balas. Mahkamah Rayuan mengakas keputusan Mahkamah Tinggi, dan mendapati tertuduh bersalah dan memberi hukuman mati. Perayu merayu ke Mahkamah Persekutuan.

Diputuskan, menolak rayuan, dan mengesahkan sabitan dan hukuman Mahkamah Rayuan:

(1) Ianya bukanlah fungsi mahkamah bicara sebelum akhir pembicaraan untuk menimbang pembelaan yang mungkin, tambahan lagi membuat spekulasi —

tambahan lagi di dalam kes semasa apabila ia (pembelaan mabuk) tidak dibangkitkan semasa kes pendakwa raya dan apabila hakim bicara telah memanggil pembelaan untuk pertuduhan membunuh. Perbuatan sedemikian adalah tidak selari dengan peruntukan-peruntukan yang relevan di dalam Kanun Prosedur Jenayah. Di dalam kes yang wajar, satu keputusan mengenai mabuk boleh dibuat pada penutup kes pendakwa raya, terutama di mana s 86(2) Kanun tersebut — yang memerlukan mabuk diambil kira untuk tujuan memutuskan kewujudan niat — adalah relevan. Ini bukanlah kes sedemikian. Di sini, hakim bicara telah memanggil pembelaan sebagaimana yang dituduh pada akhir kes pendakwa raya; hakim bicara telah bergantung kepada s 300(d) Kanun tersebut (perenggan mengenai 'pengetahuan') untuk mens rea bagi kesalahan membunuh walaupun terdapat testimoni-testimoni dari saksi pendakwa raya yang mengatakan tertuduh mungkin mabuk semasa waktu matan; dakwaan mengenai kemabukan dipertikaikan semasa kes pihak pembela (lihat perenggan 5–6).

(2) Seksyen 86(2) Kanun Keseksaan hanya memberi kesan kepada kesalahan-kesalahan yang memerlukan niat, khusus atau sebaliknya. Ia tidak termasuk sebarang jenis mens rea lain. Oleh kerana kl (d) kepada s 300 Kanun Keseksaan, hanya berhubung dengan pengetahuan semata-mata dan bukan niat, ianya bukan dalam rangkuman s 86(2). Oleh yang demikian, mabuk adalah tidak relevan dalam mendapat sabitan untuk pembunuhan jika pengetahuan sebagaimana kl (d) s 300 Kanun Keseksaan dibuktikan melepasi keraguan yang munasabah oleh pendakwa raya. Walaupun kesimpulan ini mungkin tampak tidak munasabah, ianya adalah kedudukan undang-undang sekarang ini (lihat perenggan 30); *Juma'at bin Samad v PP* [1993] 3 SLR 338 diikut.

(3) Bilamana mabuk adalah satu isu, proses memutuskan keadaan minda seseorang tertuduh pada masa perlakuan kesalahan membunuh yang mana beliau dituduh itu hanya patut dibuat dari kesimpulan dari fakta relevan yang diketahui dan pada keseluruhan keadaan sekeliling termasuklah perbuatan beliau pada masa matan dan mengambil kira keterangan mengenai keadaan mabuknya. Penggunaan s 86(2) memerlukan yang bahawa jika terdapat keterangan mabuk di hadapan hakim bicara, beliau patut mengambil kira fakta tersebut dan memutuskan sama ada ianya mempunyai berat yang mencukupi untuk menjadikan beliau mempunyai kesangsian yang munasabah mengenai niat tertuduh. Seksyen 86(2) dan mabuk tidak patut dianggap sebagai memberi peruntukkan sebagai satu pengecualian atau alasan untuk satu kesalahan yang memerlukan niat, khusus atau sebaliknya (lihat perenggan 33–34).

(4) Dalam rayuan semasa, mengesahkan pendekatan yang digunakan oleh hakim bicara dalam memutuskan mens rea apabila mabuk adalah satu isu merupakan satu perbuatan yang mengelak kl (d) sebagai satu elemen mens rea untuk kesalahan membunuh. Ini bermakna bahawa pada pertuduhan membunuh di mana pembelaan adalah mabuk si tertuduh tidak perlu menghiraukan kl (d) dan dengan senangnya boleh mengabaikan kewujudannya. Pendekatan sebegini akan membuatkan s 85 Kanun Keseksaan tidak berguna. Keduanya, ia

A mungkin juga dianggap sebagai satu lesen untuk melakukan perbuatan membunuh di bawah alasan mabuk (lihat perenggan 35); *Juma'at bin Samad v PP* [1993] 3 SLR 338 diikut.

(5) Mahkamah Persekutuan tidak dapat bersetuju dengan pendekatan yang dibuat oleh hakim bicara apabila beliau berkata 'mahkamah mesti dahulunya B membuat keputusan berhubung dengan mens rea yang relevan sebelum menimbang pembelaan mabuk' vis-à-vis s 86(2). Tujuan mabuk yang dibuktikan di bawah s 86(2) adalah agak berbeza dari pembelaan mabuk di bawah s 85(2) (lihat perenggan 42).

(6) Klausa (d), iaitu satu dari kategori mens rea untuk kesalahan membunuh C sebagaimana yang ditafsirkan di bawah s 300 Kanun tersebut, tidak patut diabaikan walaupun jika s 86(2) dibangkitkan. Ini adalah kerana di bawah s 86(2), mabuk adalah satu-satunya keadaan yang perlu diambil kira dalam membuktikan niat di mana elemen mental sesuatu kesalahan tersebut adalah niat, khusus atau sebaliknya. Jika pengetahuan adalah elemen mental yang dikehendaki, s 86(2) tidak terpakai. Taksiran harfiah untuk kl (d) di bawah D s 300 Kanun tersebut tidak membenarkan sebarang maksud lain selain pengetahuan sebagai satu elemen mens rea untuk kesalahan membunuh (lihat perenggan 43–44).

(7) Jika hakim Mahkamah Tinggi kekal dalam hala tuju yang diambilnya pada akhir kes pendakwa raya, keputusannya akan sama dengan keputusan E Mahkamah Rayuan. Selepas pembelaan yang satu-satunya itu ditolak — automatisme disebabkan serangan hypoglycaemic dan dengan s 86(2) yang hanya terpakai kepada tiga kategori yang pertama, keputusan adalah agak jelas. Ini semestinya tertakluk kepada pendakwa raya membuktikan kesemua ciri-ciri untuk kesalahan membunuh termasuklah pra-syarat yang perlu dibuktikan F di bawah kl (d) s 300 iaitu melepasi keraguan yang munasabah. Tidak terdapat sebarang merit berhubung dakwaan peguamcara untuk tertuduh yang bahawa pihak pembela tidak patut dipanggil pada penutup kes pendakwa raya (lihat perenggan 45–46).

(8) Sesuatu mahkamah rayuan hendaklah tidak cepat untuk membuat kesimpulan G mengenai keputusan fakta yang dibuat oleh mahkamah bicara. Namun begitu terdapat pengecualian seperti bila terdapat justifikasi yang jelas untuk berbuat demikian atau di mana keputusan mahkamah bicara berhubung dengan satu kesimpulan yang dibuat oleh mahkamah bicara — yang mana dalam kes sedemikian Mahkamah Rayuan juga berada di dalam keadaan yang setara H seperti hakim bicara untuk membuat keputusan. Dalam rayuan semasa, walaupun Mahkamah Rayuan campur tangan dengan keputusan hakim bicara, campur tangan tersebut adalah lebih kepada campur tangan ke atas kesimpulan yang dibuat dari fakta yang terbukti yang mana dalam keadaan sedemikian Mahkamah Rayuan juga berada di dalam keadaan yang setara dengan hakim bicara untuk membuat keputusan (lihat perenggan 48–49).

I (9) Dalam rayuan semasa, Mahkamah Persekutuan bersetuju dengan kesimpulan yang dibuat oleh Mahkamah Rayuan. Keputusan Mahkamah Rayuan adalah

lebih kukuh. Tiada terdapat justifikasi untuk memutuskan yang tertuduh telah secara tidak adil dan tidak wajar diprejudiskan oleh kesimpulan yang dibuat oleh Mahkamah Rayuan. Juga tidak terdapat apa-apa sebab untuk memutuskan yang keputusan Mahkamah Rayuan adalah silap dari segi undang-undang dan fakta (lihat perenggan 53–55).

(10) Klausa (d) s 300 Kanun Keseksaan tidak patut diabai oleh hakim bicara dalam pertimbangan keseluruhannya mengenai kes hanya atas dasar yang mabuk adalah satu isu dan s 86(2) boleh diguna pakai (lihat perenggan 58).]

Notes

For a case on finding of facts, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1791.

For cases on defence of intoxication, generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1558–1638.

For cases on mens rea, generally, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2346–2374.

For cases on s 300(d) of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1386–1401.

Cases referred to

Behari v State AIR 1953 All 203 (refd)
Broadhurst v The Queen [1964] 2 WLR 38 (refd)
Chan Chor Shuh v PP [2003] 2 MLJ 26 (refd)
China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517 (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40 (refd)
Director of Public Prosecutions v Beard [1920] AC 479 (refd)
Eng Mee Yong v Letchumanan [1979] 2 MLJ 212 (refd)
Hashim bin Mat Isa v PP [1950] MLJ 94 (refd)
Juma'at bin Samad v Public Prosecutor [1993] 3 SLR 338 (folld)
Kanji v State [1953] Cr LJ 434 (refd)
Manindra Lal Das v Emperor AIR 1937 Calcutta 432 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316 (refd)
Tan Hung Song v Rex [1951] MLJ 181 (refd)
Tay Kah Tiang v PP [2001] 2 SLR 305 (refd)
Tembo v The People [1972] ZR 220 (refd)
William Tan Cheng Eng v PP [1970] 2 MLJ 244; [1969–1971] SLR 115 (refd)
Wong Nam Loi v PP [1997] 3 MLJ 795 (refd)
Yong Pung How CJ in Juma'at bin Samad v PP [1993] 3 SLR 338 (refd)

Legislation referred to

Criminal Code [Malta] ss 35(4), 234
Criminal Procedure Code ss 347, 348
Penal Code ss 84, 85(2), 86(2), 300, 304(b)
Penal Code [Republic of Zambia] s 13(4)

Appeal from: Criminal Appeal Nos W–05–60 of 2003 and W–05–61 of 2003 (Court of Appeal, Putrajaya)

Richard Malanjum FCJ (now CJ (Sabah and Sarawak), delivering judgment of the court):

[1] This is an appeal by the appellant against the decision of the Court of Appeal rendered on 26 March 2005 whereby the appellant was found guilty of murder and sentenced to death. The High Court had earlier on in its verdict rendered on 30 June 2003 found the appellant guilty of culpable homicide not amounting to murder under s 304(b) of the Penal Code ('Code') and sentenced him to eight years imprisonment effective from 22 August 2000 (the date of arrest).

[2] Dissatisfied with the decision of the High Court, the prosecution appealed to the Court of Appeal and the appellant cross-appealed. The impugned decision of the trial court was reversed by the Court of Appeal. Hence, the appellant is now appealing to this court.

[3] The charge preferred against the appellant reads:

> Bahawa kamu pada 22 Ogos 2000 jam lebih kurang 7.55 malam di Jalan Istana Baru, di dalam Daerah Brickfields, di dalam Wilayah Persekutuan, Kuala Lumpur telah melakukan bunuh dengan menyebabkan kematian Lee Good Yew (Kad Pengenalan No 480520-07-5432) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan.

Translation:

> That you on 22 August 2000 at about 7.55pm at Jalan Istana Baru, in the District of Brickfields, in the Federal Territory, Kuala Lumpur committed murder by causing the death of Lee Good Yew (Identity Card No 480520-07-05432) and you have thereby committed an offence punishable under s 302 of the Penal Code.

[4] During the trial, the sole defence relied upon by the appellant was automatism by reason of hypoglycaemic attack at the time of the incident. But that defence did not find favour with the learned trial judge. Instead, the learned trial judge considered the probable defence of intoxication even at the end of the case for the prosecution. The step adopted by the learned trial judge led the Court of Appeal to remark thus:

> We would have thought that that exercise, viz, to consider a defence if the evidence discloses it even if it had not been raised, should only be undertaken at the conclusion of the trial when all the evidence is before the court. Section 180 of the Criminal Procedure Code ('CPC') provides that when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused and if the court finds a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence. We do not think it is the duty of the court at that stage to anticipate or speculate any defence that has not been raised and give due consideration to it. More so, a defence categorically denied to be the line

of defence to be taken as in this case. Consequently, s 181 of the CPC provides that when the accused is called upon to enter on his defence, he or his advocate may then open his case, stating the facts or law on which it intends to rely and making such comment as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses and consequently sum up his case. Section 182A of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

...

... that such an exercise should only, in a suitable case at that, be carried out at the conclusion of the trial. Even then, it should only be considered if the evidence justifies it.

[5] With respect, we are of the view that the remark by the Court of Appeal is not out of place. It is indeed not the function of a trial court before the conclusion of a trial to consider the probable defence, let alone to speculate (more so in this case when it was not raised during the case for the prosecution and indeed the learned trial judge called for the defence on murder), for to do so would not be in consonant with the relevant provisions as set out in the Criminal Procedure Code ('CPC').

[6] But that is not to say that the learned trial judge was not entitled at the end of the whole case to consider the probable defence as could be elicited from the overall evidence adduced. Indeed, he is and should do so in law (see *Chan Chor Shuh v Public Prosecutor* [2003] 2 MLJ 26; *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169) and in an appropriate case a finding on intoxication may be made at the close of the case for the prosecution especially where s 86(2) of the Code is relevant. That section requires intoxication to be taken into account for the purpose of determining the existence of intention. Hence, in such a case, an appropriate ruling could be made at the close of the case for the prosecution. However, in this instant appeal,, the learned trial judge at the close of the case for the prosecution called for the defence of the appellant as per charge. The learned trial judge relied on the fourth clause of s 300 of the Code (that is knowledge) for the mens rea of murder despite the testimony of witnesses called by the prosecution that the appellant could have been drunk at that time. And at the defence stage the allegation of drunkenness was even contradicted by some of the witnesses called for the defence including the appellant himself. Anyway, in this instant appeal the Court of Appeal did not anchor its decision on this rather technical but valid point. Hence, we say no more of it.

[7] In its judgment, the Court of Appeal took the view that knowledge, being one of the mental ingredients for the offence of murder under the Code, could and should have been considered and relied upon by the learned trial judge as he correctly did at the end of the case for the prosecution. The decision of the trial court was thus reversed and upon being convicted for the offence of murder the appellant was sentenced to death by hanging.

[8] Before us, learned counsel for the appellant, inter alia, complained that the Court of Appeal was wrong in reversing the verdict of the trial judge. He submitted and emphasised (although there were numerous grounds of appeal submitted) that the trial judge was right in his application of s 86(2) of the Code and finding the defence of intoxication based on the evidence adduced in favour of the appellant.

A In fact, learned counsel went on to say that the cross appeal of the appellant against the conviction was not even considered by the Court of Appeal. He said that the correct verdict should have been an acquittal since intention, an element for the offence of murder, was not established at the end of the case for the prosecution.

B **[9]** In respect of the cross-appeal by the appellant before the Court of Appeal, we are of the view that having arrived at their decision to allow the appeal by the prosecution it would have been merely an academic exercise to deal with it. Indeed that was clearly said by the Court of Appeal:

> C His appeal against conviction and sentence under s 304(b) of the Code is rendered academic and abates by virtue of our decision in allowing the appeal by the Public Prosecutor.

[10] Hence, we find no merit in the complaint by the appellant on this issue.

D **[11]** The learned Deputy Public Prosecutor in reply to the submission of learned counsel for the appellant argued (the gist) that knowledge is also an ingredient for the offence of murder which is not within the ambit of s 86(2) of the Code. Thus, he submitted that the Court of Appeal was correct in reversing the decision of the learned trial judge.

E **[12]** Having heard the respective contentions of the parties, we are of the view that the singular but critical issue that is presented before us is on the application of s 86(2) of the Code in relation to the mens rea for the offence of murder as defined in s 300 of the same Code with the factual matrix of this case under appeal forming the backdrop. We noted too that the sole defence relied upon by the appellant during F the trial, namely, automatism by reason of hypoglycaemic attack at the material time, was not seriously pursued before us. Be that as it may, having considered the reasons given by the learned trial judge and the Court of Appeal in rejecting the submitted defence of automatism by reason of hypoglycaemic attack at the material time, we find no ground to differ from the specific finding of the courts below.

G **[13]** For convenience the relevant provisions in the Code are herein reproduced: Section 85 states:

> (1) Save as provided in this section and in s 86, intoxication shall not constitute a defence to any criminal charge.
>
> H (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and —
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> I (b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

Section 86 states:

(1) Where the defence under sub-s 85(2) is established, then in a case falling under paragraph (a) thereof the accused person shall be acquitted, and in a case falling under paragraph (b), the provisions of s 84 of this Code, ss 347 and 348 of the Criminal Procedure Code shall apply.

(2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(3) For the purpose of this and the preceding section 'intoxication' shall be deemed to include a state produced by narcotics or drugs.

Section 300 states:

Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[14] It is an undisputed fact that the deceased was shot by the appellant at the time and place as stated in the charge and that the cause of her death was due to the injuries sustained from the gun shot. Professor Dr K Nadeson ('PW16'), a forensic pathologist attached to the University Hospital, Kuala Lumpur who examined the body of the deceased said that the external examination of the deceased showed that her frock had a tear 3cm by 1.5cm on the right mid-front of the chest area and the right cup of the brassiere showed a roughly oval shaped tear measuring 2cm by 1cm. The frock was stained with blood around the area of the tear. The internal examination showed a lacerated wound 3.7cm by 2cm on the mid-front of the right chest. The wound was placed obliquely horizontal situated 23cm below the tip of the right shoulder and about 2cm from the mid-chest. PW16 said that a ripped off jacket of a rifled weapon bullet was found lodged in the fractured 11th thoracic vertebra and a severely deformed lead core of the bullet was found lodged in the left lumbar area of the back closer to the first lumbar vertebra underneath the skin of the deceased ('exhs 54 and 55'). PW16 attributed the cause of death of the deceased due to the 'bullet wound to the chest with injuries to the vital organs'. He said that all the injuries were fatal in nature. The injuries to the heart, lung and aorta diminished any chance of survival. The witness concluded by saying this: 'They were all caused by a single bullet traversing through these areas'.

[15] The fact that the appellant did shoot the deceased with a gun is not in issue although it is one of the complaints by the appellant that the learned trial judge as well as the Court of Appeal erred in fact and in law in failing to hold that the act of shooting was involuntary.

[16] With respect, we have considered carefully the reasons given by the learned trial judge. Before coming to his conclusion that the appellant 'has failed to establish that he was undergoing a hypoglycaemic episode at the material time', the learned trial judge examined carefully all the evidence adduced including the experts' evidence. And we note that the Court of Appeal 'agree with the learned trial judge that the defence had failed to prove that the respondent was not conscious of what he was doing as a result of an unexpected hypoglycaemic attack'. Hence, we do not propose to regurgitate those reasons in this judgment. As intimated hereinabove, we find no reason to disagree with the conclusion of the learned trial judge and as endorsed by the Court of Appeal. Accordingly, the complaint of the appellant on this issue which was extensively canvassed in the written submission of his learned counsel merits no further consideration.

[17] The bulk of the primary facts gathered by the learned trial judge from the evidence adduced are not in contention. Indeed, the Court of Appeal had also painstakingly narrated the relevant evidence adduced and the findings of the learned trial judge. Hence, it would be adequate for the purpose of this judgment that we only reproduce the relevant findings of the learned trial judge, verbatim where appropriate.

[18] It is the finding of the learned trial judge that:

> On 22 August 2000 at about 1.45pm, the accused (the appellant before us) joined three of his friends at the Weng Seng Restaurant. They had lunch and some alcoholic drinks. The accused had five to six glasses of beer and was talkative. He left the restaurant in his car at about 7pm. He appeared normal and did not look drunk. He telephoned DW4 just after 7pm. He told her that he was on his way home and that he was alright. He told her not to worry. DW4 said that whenever the accused comes back home late from work he would telephone her. On the way back, he would have paid toll at two points. Just before 8pm, his car was parked across the road at Jalan Istana Baru. He was standing on the middle of the road like a policeman manning a roadblock. He stopped a motorcyclist who sped off immediately. He then took out a gun from the ankle holster on his leg and fired two shots in the air. PW4, who was driving a taxi, was then stopped by the accused. In doing so, the accused pointed the gun at him. When PW4 stopped the accused went towards him. The accused asked PW4 to get out. When PW4 got out of the car the accused told him to stay there. The accused then pointed the gun in the direction of PW4's head and stomach. The accused told PW4 to stand straight. When he did so the accused signalled to him the 'Good' sign by showing the thumb. PW4 stood straight for about ten minutes. The accused then walked towards a Perdana car on the right of PW4. He looked normal, was steady and not staggering. He knocked at the windscreen and driver's side of the window of the Perdana with the gun asking the driver to come out. The driver did not come out. The accused tried to open the door and looked angry. He then moved to the front right side of the car and fired a shot which went through the driver's side of the Perdana. When PW6 shouted at the accused, he fired a shot in the direction of PW6. PW6 asked everybody else to get out of their cars. The accused then fired shots at a military truck. He then went towards a parked taxi and was searching for the driver. The accused appeared confused and was walking

aimlessly as if he was lost. He appeared to be unconscious of his surroundings. He pointed his gun at the crowd whenever they tried to approach him. The accused was steady before his arrest. At the police station the accused slept on the floor for about 20 minutes and became incontinent. When PW15 saw the accused at about 10.05pm, he was aggressive and had a strong smell of alcohol. The accused kept referring to him as one Khoo Ah Si. The accused was taken to the hospital at 12.30am. When PW8 saw him he was agitated, restless, abusive and demanding to be freed of his handcuffs. He was alert and wanted to contact his wife. The accused then wrote a note on a piece of paper (exh P17). He was not aware why the police had arrested him.

[19] Bearing in mind, the verdict arrived at by the learned trial judge the evidence of the chemist, Pua Hiang, (PW13) may also be of significance. From the appeal record before us, it is on record that PW13 was attached to the Department of Chemistry, Petaling Jaya. He testified that he analyzed the blood sample in exh P19 and found it to contain 198mg of ethyl alcohol per 100ml and the urine sample in exh P20B to contain 257mg of ethyl alcohol per 100 ml. The results of the alcohol in the urine as compared to that in the blood specimen were approximately in the ratio of four to three. PW13 also expressed his view that the level of alcohol in the urine and blood would have some effects on the person. PW13 further testified that when a person has taken alcohol, there will be a period called the peak period which peaks for a while before declining. And he said that based on the urine and blood samples ratio results one can say whether the samples were taken at the peak period or not. PW13 went on to say that it is possible to estimate the alcohol level in a person for a certain period prior to the taking of the samples but it is by no means accurate because in doing this estimation, there are certain variables, though not absolute, require consideration. The variables include body weight. The number of times that a person has urinated prior to the taking of the specimen can be a variable for the urine test but not the blood test.

[20] At the end of the case for the prosecution, the learned trial judge ruled that he was satisfied that 'the prosecution has made out a prima facie case of murder (under s 300(d)) against the accused'. He then called upon the appellant to enter on his defence for the offence of murder. The appellant chose to give evidence on oath.

[21] In ruling that there was a case to answer for murder under s 300 with the fourth clause of the mental element applicable (the learned trial judge referred to it as cl (d) of s 300 which we hereby adopt), the learned trial judge was satisfied that the twin requirements of cl (d) had been fulfilled.

[22] On the first prerequisite that 'the person committing the act must know that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death' the learned trial judge after expounding the related legal principles gave the factual reasons for being so satisfied by saying this:

I then considered the facts of the case in order to determine whether the accused had the required knowledge. When the motorcyclist sped off, he fired two shots in the air. When he stopped PW4, he did not fire as PW4 had followed the instructions that were given. He then knocked at the windscreen at the driver's side of the window of the Perdana asking the driver to come out. He only fired after the person refused to open the door of the car.

It was a response to his orders not being obeyed. The shot was fired at point blank range at the front windscreen of the car. If the door had been opened the accused would not have fired the shot just as in the case of PW4. He was in a position to decide when to fire and when not to. He was therefore conscious of what he was doing. The conduct of the accused in firing the shot shows that it was done with absolute callousness towards the result. It was in general disregard for human life and safety. This clause is usually applied in such cases (see *Janardan Prasad v State of Rajasthan*). The use of a firearm by the accused is significant. It is a lethal weapon. Where a shot is fired at a person there is a strong probability that it will cause death or such bodily injury as is likely to cause death. This is particularly so in this case bearing in mind the circumstances in which the shot was fired at the deceased. The shot was fired from outside at the deceased who was seated inside the car. Obviously, it will hit the upper part of the body of the deceased where the vital organs are. Accordingly the bullet fired by the accused hit the chest area of the deceased and PW16 said that the injuries sustained were necessarily fatal. Firing at a person at close range with a pistol in the circumstances as in this case is an evident risk to human life. It is a risk which is both threatening and near. It amounts to an act which is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death. As Wanchoo CJ said in *Kanji v State* [1953] Cr LJ 434 at p 435:

> We are, therefore of the opinion that where a person takes the risk of shooting at another the act would ordinarily be an imminently dangerous act which must in all probability cause death or such bodily injury as is likely to cause death and the case would be covered by the fourth clause in s 300.

It can be presumed that a person had knowledge of the danger of his act (see *Bhagat Singh v Emperor* 121 IC Lah 726; *Ranji v State* 1952 RLW 145). As Dixit J said in *Gyarsibai v State* at p 62:

> Every sane person — and in this case, we are bound to take it that the appellant was sane — is presumed to have some knowledge of the nature of his act. This knowledge is not negatived by any mental condition short of insanity.

An act which is necessarily fatal carries with it knowledge of its consequences (see *Emperor v Mt Dhirajia*). Thus, no special knowledge is needed to know that one may cause death or such bodily injury as is likely to cause death by shooting as in the case of setting fire to the clothes of a person (see *State of Madhya Pradesh v Ram Prasad*). Similarly, it has been held that the act of an accused in jumping into a well with her children is clearly one done by her knowing that it must in all probability cause the death of her children (see *Emperor v Mt Dhirajia*). This presumption may of course be rebutted. In my opinion, the degree of knowledge that is required can therefore be fastened on the accused from the imminently dangerous nature of the act itself of shooting at the deceased at point blank range based on a decision made for that purpose. As I have explained earlier, the fact that he was in a state of intoxication does not exclude him from liability under cl (d). In *Kanji v State*, the accused who was heavily drunk shot at a boy with a gun from a distance of about ten paces and the shot struck the abdomen of the boy who died shortly afterwards. It was held that the accused was guilty of murder under this clause... Needless to say, if the level of intoxication of the accused was so high that he did not know that what he was doing was wrong or did not know what he was doing the burden is on him to bring his case within the meaning of s 85(2)(b). I was therefore satisfied that the prosecution had established this ingredient.

[23] Similarly, for the second prerequisite of 'the act must have been committed without any excuse for incurring the risk of causing death, or such injury', the learned trial judge also reviewed the legal principles relevant to it and then said this:

> In this case, the accused was not in the plight of the woman as in the case that I have just referred to. He shot at the deceased when she refused to open the door of her car and had absolutely no reason to do so. In such circumstances, the firing of the shot at her is wholly inexcusable both on legal and moral grounds. It does not fall within any of the exceptions enumerated in s 300. I was therefore satisfied that the prosecution had established that the act of the accused was wholly inexcusable.

[24] The Court of Appeal held that that aspect of the ruling by the learned trial judge at the end of the case for the prosecution was correct. In its judgment, the court stated:

> We are of the view that the learned trial judge was correct in ruling as such. In arriving at that decision he had extensively and correctly appraised the law. We would agree with his finding that the following ingredients of murder under s 300(d) of the Code have been established at the conclusion of the case for the prosecution...
>
> Besides being satisfied that the facts are capable of coming within the ambit of s 300(d) of the Code, the learned trial judge was also of the view at the conclusion of the case for the prosecution that the fact that the respondent was in a state of intoxication does not exclude him from liability under s 300(d).
>
> There was clearly a prima facie case against the respondent which, if unrebutted, would warrant his conviction and the learned trial judge was correct in calling upon the respondent to enter on his defence. The learned trial judge correctly observed that 'intention' is not a necessary element in s 300(d) of the Code and all that is required to be proved is 'knowledge' that the act is likely to cause death.

[25] However, in his final judgment at the end of the whole case, the learned trial judge said this, inter alia:

> In the light of my finding on hypoglycaemia, the alternative defence submission of intoxication becomes a live issue. In view of the similarity of the symptoms of hypoglycaemia and intoxication as testified by the experts the behaviour of the accused at the material time must have been caused by intoxication. I had called upon the accused to enter his defence on that basis. With my rejection of hypoglycaemia the reason for the accused's slow recovery and incontinence at the police station becomes clear. DW3 said that the slow recovery and incontinence of the accused is consistent with intoxication. The accused's incontinence will throw light on the stage of his intoxication at the time of the incident. In accordance with the Dubowski Chart, it would have been at the upper level. This means that his blood alcohol level at the time of the incident would have been very much higher than what was revealed by the samples taken at 1.20am. It follows that he would have had more than six glasses of beer. In any event, as I said in an earlier part of the judgment, the defence of intoxication can be established without the support of scientific evidence. Thus having considered the whole of the evidence adduced, it is my firm finding of fact that the accused was in a state of intoxication at the time of the incident. I am therefore satisfied, on the balance of probabilities, that the state of intoxication of the accused at the material time, which I have explained in an earlier part of the judgment, precluded him from forming the necessary intention.
>
> However, in finding that a case had been made out against the accused under cl (d) I had proceeded on the basis that it is the direct consequence of intention having been negated by intoxication that rendered the other parts of s 300 inapplicable. My research has now raised the question of the manner of ascertaining the existence of intention where intoxication is

in issue, that is to say, whether such a determination must first be made without taking intoxication into consideration. I had brought this view to the attention of both parties in their submissions at the end of the defence case. They agreed with what I have set out below as the correct approach to determine intention in a case involving intoxication.

It is settled law that an inference of intention can be rebutted by evidence of intoxication pursuant to s 86(2). In cases where intoxication is in issue, the court must determine whether the accused had the requisite specific intent in the light of his intoxication (see *R v Sheehan* [1975] 2 All ER 960); *Kennedy v HM Advocate* [1944] SC (J) 171; *Bratty v Attorney General for Northern Ireland*). The critical matter for deliberation is whether a finding on the relevant mens rea must first be made before taking intoxication into consideration. This will have a determinative effect on the precise limb of s 300 that is applicable in cases of this nature. The onus of proof where intoxication is raised as a defence is on the accused.

...

I shall now consider the mens rea under which the accused acted. Before doing so, it is necessary to consider the distinction between intention and knowledge. Generally, stated intention is the purpose or design with which an act is done. It is the fore-knowledge of the act, coupled with the desire of it. Knowledge is an awareness of the consequences of the act. There is a close relationship between intention and knowledge.

...

Thus, knowledge of a consequence which is virtually certain will be evidence of intention. An intention can be inferred from the nature of the act of a person (see *R v Monkhouse* [1849] 4 Cox CC 55). The nature of the weapon used and the part of the body to which the injury is caused may also facilitate the drawing of such an inference. In this case the accused fired the shot from outside the car into its driver's side through the front windscreen. The shot hit the upper part of the body of the driver where the vital organs of the body are situated. The shot is virtually certain to cause death and the accused must be presumed to know this. The act of the accused in firing the shot was deliberate as it was done following the refusal of the deceased to open the door of the car. The deliberate use of a dangerous weapon at another leads to the irresistible inference that it was done with the intention to cause death (see *Tham Kai Yaw & Ors v Public Prosecutor* [1977] 1 MLJ 174). Furthermore, the act of the accused in firing the shot was not one of accident or negligence. In *Behari v State* AIR 1953 All 203, it was held that where the injury caused is not the result of accident or negligence a strong presumption arises that the injury caused was intended to be caused though this presumption may be rebutted. That would be so even if there was no intention to cause death.

...

The circumstances in which the shot was fired therefore go beyond mere knowledge and it must be inferred or presumed that it was done so intentionally. Thus, the facts of the case fall within s 300(c) where intention is in issue. Clause (d) only applies where no other part of s 300 is applicable. Thus in a case like this where the intention of the accused as inferred from the result of his act could at least be that of causing such bodily injuries as the accused would have known to be likely to cause death cl (d) will have no application.

...

In *Behari v State* AIR 1953 All 203, it was held that cl (d) does not apply to cases where a person intends to inflict an injury likely to cause death. The charge against the accused under cl (d) cannot therefore stand as the applicable section is s 300(c).

The presumption of the absence of intoxication which facilitated a finding that the accused acted with intention as envisaged by s 300(c) is displaced by the evidence of intoxication on

record to show that he did not have the requisite intention. This means that the act of the accused which gave rise to an inference of intention has been rebutted. However, the fact remains that it is a case which initially fell under s 300(c). It is on that basis that s 86(2) became applicable. It is also on that basis that cl (d) became inapplicable. However, the facts are sufficient to make out a case under s 304(b) which does not require an intention to cause death or to cause such bodily injury as is likely to cause death. Such a course was adopted in cases such as *Suba Singh v Public Prosecutor*; *Tan Hung Song v R* and *Public Prosecutor v Teo Heng Chye*. Thus, I am unable to agree with the submission of the prosecution that the facts of the case disclose a case under cl (d). Accordingly, I find the accused guilty of an offence under s 304(b).

[26] The vexed question therefore is whether, having come to a finding that the appellant was intoxicated at the material time the learned trial judge was precluded ipso facto, as he held, by reason of the application of s 86(2) from considering cl (d) of s 300 of the Code despite the availability of evidence to warrant such consideration. As noted earlier on the learned trial judge at the end of the case for the prosecution called for the defence of the appellant on the basis that mens rea under cl (d) had been established. No doubt he attempted subsequently to clarify his ruling by saying this:

In view of the similarity of the symptoms of hypoglycaemia and intoxication as testified by the experts, the behaviour of the accused at the material time must have been caused by intoxication. I had called upon the accused to enter his defence on that basis.

[27] The Court of Appeal did not agree with the approach and the final conclusion of the learned trial judge. The court emphasised that 'knowledge' as embodied in cl (d) is also a mens rea for the offence of murder under the Code. And after referring to the dicta of Yong Pung How CJ in *Juma'at bin Samad v Public Prosecutor* [1993] 3 SLR 338, the court held, inter alia, that where cl (d) had been established s 86(2) did not apply. In fact even the learned trial judge expressed a similar view earlier on in his judgment when he said this:

Thirdly, s 86(2) provides that where the accused is intoxicated, voluntarily or not, his intoxication is to be taken into account for the purpose of determining whether he had formed any intention, specific or otherwise. The sub-section does not refer to other mental elements such as knowledge or rashness. In *Director of Public Prosecutions v Majewski* [1977] AC 443, the House of Lords has confirmed the rule that evidence of self-induced intoxication negating mens rea is a defence to a charge of a crime requiring a specific intention but not to a charge of any other crime. *It follows that s 86(2) will have no application in the case of offences requiring such other mental elements.*

...

It will be observed that cll (a), (b) and (c) of s 300 contemplate intention in one form or another. In cl (a), it is intention to cause death. In cll (b) and (c), it is intention to cause bodily injury. On the other hand, there is no requirement of an intention to cause death or bodily injury in cl (d) of s 300 ('cl (d)'). Thus, intention is not a necessary element in cl (d); all that is required to be proved is knowledge that the act is likely to cause death (see *Inder Singh v Crown* [1928] ILR 10 Lah). It has been held that this clause is intended to apply only when there is no intention to cause death, or in other words, when the three earlier clauses are inapplicable (see *Hasta Ismail v Emperor* AIR 1937 Lah 593; *Behari v State* AIR 1953 All 203). *Section 86(2) is therefore applicable to cll (a), (b) and (c) of s 300 and inapplicable to cl (d)*. (Emphasis added.)

[28] As indicated earlier, before us, on the issue of intention and knowledge for the offence of murder, learned counsel for the appellant submitted rather forcefully that since the learned trial judge had held that the mental element required to be proved under the charge against the appellant was intention, but which was absent due to his intoxicated state at the material time, his defence should not even have been called and that the only proper verdict should have been an acquittal.

[29] In our view, the foregoing argument presupposes that the learned trial judge was correct in his approach on the construction and application of s 86(2) (intoxication) in relation to the mens rea of murder under the Code, in particular cl (d).

[30] Our answer to the argument is that s 86(2) only affects those offences which require intention, specific or otherwise, and excludes other types of mens rea. But since cl (d), involves merely knowledge and not intention, it is therefore not within the ambit of s 86(2). Put it in another way, intoxication is irrelevant in securing a conviction for murder if knowledge as per in cl (d) is proved beyond reasonable doubt by the prosecution. Such conclusion may appear to be preposterous. But that appears to be the position of the law for now. The difficulty posed by s 86(2) was recognized and discussed in the case of *Juma'at bin Samad v Public Prosecutor* where it was said at p 344:

> It is to be noted that an anomalous consequence of the drafting in s 86(2) is that it applies only where the mens rea for the offence is intention, in contradistinction to offences requiring other forms of mens rea specified in the Penal Code, for example, knowledge or rashness. The result is somewhat disturbing; for example s 86(2) would apply to a charge of murder under s 300(a), (b) or (c) but not to a charge of murder under s 300(d). However the words of the provision are clear and the consequences though discomfiting are not of such degree of absurdity as would justify the court departing from a literal interpretation.

[31] Hence, in our view the direction taken by Court of Appeal in coming to its decision is right.

[32] Anyway, we would also say at this juncture that the approach advocated by the learned trial judge where intoxication is in issue may be correct if guidance is taken only from the cases he referred to and cl (d) does not exist as a mens rea for murder. Further, it is also a matter of true construction and application of s 86(2) of the Code.

[33] Putting aside cl (d) for the moment, it is trite law that intention may be inferred from the known relevant facts and on the totality of the surrounding circumstances. Thus, in our view where intoxication is in issue the process of determining the state of mind of an accused person at the time of commission of the offence for which he is charged should be by way of inferences from the known relevant facts and on the totality of the surrounding circumstances including his conduct at the material time and taking into account the evidence of his intoxicated state and not by way of 'ascertaining the existence of intention where intoxication is in issue, that is to say, whether such a determination must first be made without taking intoxication into consideration'.

[34] In other words, the application of s 86(2) entails that if there is evidence of intoxication before a trial judge, he should take such fact into account and to determine whether it is weighty enough to leave him with a reasonable doubt about the accused's guilty intent. Section 86(2) and hence intoxication, in our view, should not be construed as providing an unqualified exception or excuse for an offence which requires intention, specific or otherwise. Indeed, the provision only stipulates that where intent, specific or otherwise, is an essential element of a particular offence, evidence of the state of drunkenness rendering the accused incapable of forming such intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to commit the particular crime. If he was so drunk at the material time that he was incapable of forming the intent required he would not be convicted of the crime which could only be committed with the required intent, specific or otherwise.

[35] Reverting to the present appeal, we are of the view that affirming the approach adopted by the learned trial judge in determining mens rea when intoxication is in issue would tantamount to side-stepping cl (d) as one of the elements of mens rea for the offence of murder. It would mean that on a charge for murder where the defence is intoxication an accused person does not have to be concerned with cl (d) and may conveniently disregard its existence. With respect, in our view such an approach would firstly render s 85 otiose. Secondly, it might even be perceived as a license to commit murder under the cover of intoxication. In *Juma'at bin Samad v Public Prosecutor*, Yong Pung How CJ (Singapore) noted that 'the scope of s 86(2) generously extends to voluntary intoxication, a legal excuse which,..., can never put an accused in a more favourable position than another accused who pleads any of the other defences.' And the learned Chief Justice went on to say that the fact that there seems to be an 'anomalous consequence of the drafting in s 86(2)' should not detract this court from giving it a literal interpretation.

[36] Our foregoing view is not without judicial precedent. In *Broadhurst v The Queen* [1964] 2 WLR 38 (PC) the appellant was charged for the murder of his wife. The jury acquitted him of the charge but convicted him for 'causing grievous bodily harm from which death shall ensue' under s 234 of the Criminal Code of Malta. The sole defence of the appellant was that he could not remember how the event happened since he was drinking heavily earlier on. On appeal to the Privy Council, s 35(4) of the Criminal Code of Malta which is in pari materia to our s 86(2) came up for consideration. The section reads:

> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

[37] In dealing with the section, the opinion of the board is instructive. This is what Lord Devlin said at p 51:

> Under sub-s (4) it would appear that drunkenness is to be taken into account for the purpose of determining whether the person charged had in fact formed any intention necessary to constitute the crime.

[38] Having expressed his view on the difficulty presented by the proposition of law in *Director of Public Prosecutions v Beard* [1920] AC 479 in particular on the requirement of incapacity of forming the specific intent essential to constitute the crime, Lord Devlin went on to reemphasize the scope of s 35(4) by saying:

> Prima facie intoxication is one circumstance to be taken into account, and on this view all that s 35(4) is doing is to make it plain that intoxication is not to be excluded.

[39] His Lordship also provided a guide in the application of s 35(4) by saying, albeit indirectly, that the issue of intoxication may be disregarded when there is nothing at all to suggest that an accused person was incapable of forming the intent. He said this:

> Before the Board the Crown conceded that it is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this concession.
>
> ...
>
> It is not enough to show that before the event the accused had been drinking very heavily (as the Chief Justice told the jury, the effect of alcohol varies greatly with different people) and that when examined after the event he was pronounced to have been under the influence of alcohol.

[40] In our view, the corollary to what was said by Lord Devlin on the application of s 35(4) is similar to what was said by the learned trial judge earlier on in his judgment and which was approved by the Court of Appeal albeit tacitly, in that where intention is not the required mental element to constitute the crime the fact of intoxication (s 86(2)) poses no difficulty.

[41] Incidentally and just as a matter of interest, s 13(4) of the Penal Code of the Republic of Zambia has a similar provision as our s 86(2). In the case of *Tembo v The People* [1972] ZR 220 (CA), the Zambian Court of Appeal held that to constitute 'evidence fit to be left to a jury' for the purposes of s 13(4) there must be evidence that an accused person's capacities may have been affected to the extent that he may not have been able to form the necessary intent.

[42] Thus, with all due respect we are therefore unable to agree with the subsequent approach undertaken by the learned trial judge when he said that 'the court must first make a finding on the relevant mens rea before embarking on a consideration of the defence of intoxication' vis-a-viss 86(2). In our view the purpose of proved intoxication envisaged in s 86(2) is quite apart from the defence of intoxication under s 85(2). Indeed, one may say that s 86(2) is not a 'defence-giving' provision similar to some other provisions in the Code.

[43] Thus, the answer to the vexed question is that cl (d), being one of the categories of mens rea for the offence of murder as defined in s 300 of the Code, should not be disregarded even if s 86(2) is raised. The reason is simply because under

s 86(2), the fact of intoxication is only a circumstance to be taken into account in proving intention where the mental element of an offence is one of intention, specific or otherwise and if knowledge is the required mental element s 86(2) does not apply. Indeed, the learned trial judge and the Court of Appeal were in ad idem on the inapplicability of s 86(2) where knowledge is the element of mens rea to an offence and in fact earlier on in his judgment the learned trial judge rightly put it in this way:

> Where, therefore, s 86(2) is rendered inapplicable in a particular case by virtue of knowledge only being the ingredient to be proved it must be taken to mean that an intoxicated person had the same knowledge as he would have had if he had not been intoxicated. This is the inevitable result as the exclusion of intoxication as a factor to be considered in determining liability simply means that it warrants no consideration at all. Of course, if the level of intoxication of a person is so high that he did not know that what he was doing is wrong or did not know what he was doing, the burden is on him to bring his case within the meaning of s 85(2)(b).

[44] Further, a plain literal interpretation of cl (d) in s 300 of the Code allows no other reasonable meaning other than to say that knowledge is another element of mens rea for the offence of murder. Of course the twin requirements of that clause, namely, (a) the person committing the act must know that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death; and (b) the act must have been committed without any excuse for incurring the risk of causing death, or such injury, must be established before it can be said that that mens rea has been proved. A plethora of cases have also answered any doubt that knowledge is a sufficient mens rea for the offence of murder (see *Hashim bin Mat Isa v Public Prosecutor* [1950] MLJ 94; *William Tan Cheng Eng v Public Prosecutor* [1970] 2 MLJ 244; [1969–1971] SLR 115; *Kanji v State* [1953] Cr LJ 434; *Manindra Lal Das v Emperor* AIR 1937 Calcutta 432; *Behari v State* AIR 1953 All 203).

[45] We venture as well to say that had the learned trial judge maintained the course that he took at the end of the case for the prosecution his final verdict might have been similar to that of the Court of Appeal. It should be noted that the learned trial judge did not accept the sole defence relied upon by the appellant, namely automatism by reason of him undergoing a hypoglycaemic episode at the material time. Upon rejection of that sole defence and with s 86(2) only applicable to the first three categories, the verdict would have been quite obvious subject of course to proof to the standard of beyond reasonable doubt by the prosecution of all the elements for the offence of murder including the prerequisites to be established in cl (d).

[46] We are therefore of the view that there is no merit in the contention of learned counsel for the appellant that the defence should not have been called at the close of the case for the prosecution.

[47] The next question is whether the Court of Appeal, relying upon cl (d), was correct in reversing the decision of the learned trial judge. In so doing, the Court of Appeal said this, inter alia:

A At the conclusion of the case for the prosecution, the learned trial judge found that the prosecution had made out a prima facie case of murder under s 300(d) of the Code against the respondent and called upon him to enter on his defence. We are of the view that the learned trial judge was correct in ruling as such. In arriving at that decision he had extensively and correctly appraised the law. We would agree with his finding that the following ingredients of murder under s 300(d) of the Code have been established at the B conclusion of the case for the prosecution, namely:

(a) that the respondent knew that his act of discharging the gun at the deceased at such close quarters is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death; and

(b) that the act of the respondent was wholly inexcusable.

C Besides being satisfied that the facts are capable of coming within the ambit of s 300(d) of the Code, the learned trial judge was also of the view at the conclusion of the case for the prosecution that the fact that the respondent was in a state of intoxication does not exclude him from liability under s 300(d).

There was clearly a prima facie case against the respondent which, if unrebutted, would D warrant his conviction and the learned trial judge was correct in calling upon the respondent to enter on his defence. The learned trial judge correctly observed that 'intention' is not a necessary element in s 300(d) of the Code and all that is required to be proved is 'knowledge' that the act is likely to cause death.

...

E On the day of the incident, the respondent was armed with a loaded gun which he kept in an ankle holster. We are of the view that he cannot be regarded as a person having no knowledge about the dangerous character of a loaded gun which is clearly a lethal weapon. The learned trial judge ruled at the close of the case for the prosecution, and we agree, that at the time of the incident the respondent was sufficiently conscious of what he was doing. In his judgment, the learned trial judge held:

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(i) the sequence of events indicate that he had sufficient mental capacity to be responsive enough to make a decision;

(ii) he was sufficiently conscious of what he was doing when he fired the fatal shot as a result of a decision made by him following a refusal to obey his instructions;

G (iii) he was in a position to decide when to fire and when not to; he was therefore conscious of what he was doing;

(iv) the conduct of the respondent in firing the shot shows that it was done with absolute callousness towards the result.

The fact, as found by the learned trial judge, that the respondent was intoxicated at the time H he shot the deceased is no excuse. Section 85(1) of the Code clearly provides that save as is provided in the section and in s 86, intoxication shall not constitute a defence to any criminal charge. We also cannot see how intoxication can be available to him as a defence under s 85(2) of the Code; the intoxication, if at all, was admittedly self-induced and therefore, he must be deemed to have committed the act with the same knowledge as he would have had if he had not been intoxicated. The charge he is facing is murder under I section 300(d) of the Code. The mens rea for that offence is 'knowledge' and not 'intention'.

...

Similarly in the instant appeal before us, we cannot ignore and overlook the lack of cross-examination of witnesses called before and after defence was called touching upon intoxication. We also cannot ignore the fact that the 'alternative' defence of intoxication was

only suggested for the first time during the defence submission at the conclusion of the trial. We further cannot ignore the fact that the foundation for such a defence had not been properly laid.

Section 182A of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt and if the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted on it. In this instant appeal, on the evidence, we are of the unanimous view that the learned trial judge had misdirected himself in fact and in law and ought to have found the respondent guilty on the original charge of murder. The facts are sufficient to bring the case within the ambit of s 300(d) of the Code and the act of the respondent would fall within the definition of murder. The invocation of s 300(c) of the Code by the learned trial judge is altogether erroneous. Intention is not a necessary element of an offence under s 300(d). All that is needed is knowledge that the act is likely to cause death. The emphasis in s 300(d) is on the imminently dangerous character of the act itself. Further, s 300(d) is usually applied where the act of the offender is in general disregard for human life and safety. What is clear from the evidence is the respondent did not know the deceased. He discharged the gun in absolute callousness towards the result. The act of the respondent cannot fall within the purview of s 304(b) of the Code. He has committed culpable homicide amounting to murder and the offence committed by him clearly fall under s 300(d) of the Code. All the evidence proved beyond doubt that he had performed the act knowingly and voluntarily and hence must be guilty of an offence under s 302 of the Code. The respondent had failed to show on a balance of probabilities that he did not know that his act of discharging his gun at the deceased at such close quarters is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. The learned trial judge's ruling at the conclusion of the trial that the facts cannot fall within s 300(d) of the Code cannot be supported having regard to the evidence. On the evidence it was clearly open to the learned trial judge to find that it was established beyond reasonable doubt that the respondent caused the death of the deceased.

We are unanimously of the view that the appellant is guilty of murder under s 302 of the Code and hence, we accordingly allowed the appeal by the Public Prosecutor, substituted the conviction under s 302 of Code in place of the conviction under s 304(b) of the Code and sentenced the respondent to death by hanging.

[48] It was submitted before us that in reversing the decision of the learned trial judge the Court of Appeal interfered with the findings of facts as found by the former, in particular on the issue of intoxication. It was submitted that an appellate court should be slow in interfering with any finding of fact by a trial court. To this preposition of law, we agree subject of course to certain qualifications such as where there is clear justification for doing so (see *Eng Mee Yong v Letchumanan* [1979] 2 MLJ 212) or where the finding relates to an inference made by the trial judge in which case an appellate court will be more readily to interfere as the appellate court would be in an equally good position as the trial judge to make the determination (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517).

[49] In this instant appeal, the Court of Appeal did interfere with the finding of the learned trial judge on his finding of the appellant being in an intoxicated state at the material time but having read the judgments of both courts we would say that such interference by the Court of Appeal was more in the nature of interference on

A the inferences to be given from the proved set of facts in which case the Court of Appeal would have also been in an equally good position as the learned trial judge to make the determination.

[50] For instance, in finding that the appellant was intoxicated at the material time, B the learned trial judge said this:

> ... the defence of intoxication can be established without the support of scientific evidence. Thus, what is more pertinent is evidence of the state of mind of the person at the material time. The best evidence to establish his state of mind is his conduct prior to, at the time of, and after the offence. I say this because what is in issue is the effect of intoxication on the C state of mind of the person in order to determine whether he could have formed the necessary intention. This is best reflected by his conduct and not the level of his intoxication. The blood alcohol level is certainly an element, and an important one, to explain his conduct. The significance of the conduct of a person as an indicator of his level of intoxication is illustrated by the Federal Court case of *Liew Koh Tai v Public Prosecutor* D [1965] MLJ 54 where, on the facts of the case, the conduct of the accused was held to negate intoxication. In *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 815, the rational behaviour of the accused coupled with low blood alcohol level was held to be unsustainable to support the plea of intoxication. In *Tan Hung Song v R*, it was recognized that a blood alcohol reading of 215mg of ethyl alcohol to 100ml of urine shows that a person was in a certain state of intoxication. In *Public Prosecutor v Tan Ho Teck* [1988] 3 MLJ 264, part of E the evidence that established the heavy intoxication of the accused was the fact that his blood was found to contain 232mg alcohol per 100ml of blood.

[51] The learned judge also found the following to be indicative of the intoxicated state of the appellant at the material time, namely:

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(i) his behaviour of stopping his car in the middle of the road;

(ii) firing shots at those motorists who did not comply with his instructions;

(iii) he made no attempt to flee from the scene of the incident;

G (iv) he was walking aimlessly as if he was lost and appeared to be unconscious of his surroundings;

(v) while at the police station, he slept off and passed urine and faeces in his pants;

(vi) no caution was administered to him by PW15 simply because PW15 saw that H he was under the influence of alcohol and was aggressive;

(vii) he used vulgar words to find out why he was arrested;

(viii) he referred to PW15 as Khoo Ah Si;

(ix) the doctor who examined him (PW8) said that clinically, he was under the I influence of alcohol though he was alert. PW8 also said that he had smell of alcohol in his breath, his face was flushed, he had a staggering gait, his hand was unsteady, he had slurred speech and was in a state of extreme agitation; and

(x) his blood sample was found to contain 198mg of ethyl alcohol per 100ml and his urine sample contained 257mg of ethyl alcohol per 100ml.

[52] On the other hand, the Court of Appeal came up with the following findings or inferences on the same issue when it said this: **A**

> Looking at the facts, it appears that there is no evidence to show that the respondent was intoxicated at the time of the incident. PW14, the owner of the said restaurant said the respondent looked normal and did not look drunk when he left the said restaurant. DW5, the respondent's colleague who was at the lunch said that the respondent was not affected by drinks, his speech and behaviour was usual and he did not misbehave. When they left the said restaurant the respondent was normal and he saw him walking to his car. PW4, the taxi driver at the scene said the respondent looked steady and was not staggering when walking. He also did not 'get any smell' from the respondent. PW7, the police officer who arrested the respondent observed he was steady before his arrest. In his evidence, the respondent even insisted that he was not highly intoxicated on the day of the incident. He could even recall what clothes he wore on that day and the number of glasses of beer he consumed. The defence did not elicit any evidence concerning the matter of intoxication but submitted on intoxication only at the conclusion of the trial. **B** **C**
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> ...
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> Looking at the above *we are of the view that even if the respondent was intoxicated as found by the learned trial judge*, on the evidence he was not in a highly advanced stage of drunkenness as not to know what he was doing for the following reasons: **D**
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> (i) he could drive after leaving the said restaurant and could consciously negotiate a route where he has to pass through two toll gates; the respondent was in full control of his car as a car surely cannot be driven along a road in the city of Kuala Lumpur without the mind directing the limbs for the journey; **E**
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> (ii) he could make a telephone call to his wife to say he was on his way home at 7.15pm;
>
> (iii) at the scene of the incident, when he tried to stop a motorcyclist who then sped off, he was capable of drawing his gun from an ankle holster and was able to squeeze the trigger to fire a couple of rounds in the air; he was also able to talk to PW4, the taxi driver and was in position to give instructions which could easily be understood; subsequently, he was able to aim the gun at the deceased, squeeze the trigger and shoot her through the windscreen and later, at PW6 and also the military land rover; **F**
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> (iv) at about 11.15pm at the IPK, he was able to have an intelligent conversation with PW15 and specifically request that he be allowed to make a telephone call to Tan Sri Musa Hitam; **G**
>
> (v) when he was being examined by PW8 at about 1.15am on 23 August 2000, he was able to sign the consent form for the taking of blood and urine samples, to write an intelligible note to Professor Dr Ernest Yeoh requesting him to make a call to his wife at a given telephone number to inform her about the arrest and for her to make a call to Tan Sri Musa Hitam; further, he was able to have an intelligent conversation with PW8 about his health, was able to answer her questions and give her the details requested for and was very cooperative throughout the examination. **H**
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> ...
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> In the instant appeal, we are of the view that the weight of evidence clearly established that the respondent was very much in control of his actions despite the alcohol he consumed. The evidence showed that at the place of the incident, the respondent was capable of moving himself independently and was able to converse with others. There was no evidence to show that he was staggering or was incoherent in his speech; PW4 could comprehend him. We find that he has failed to prove any incapacity as would be available to him as a defence. There is nothing to show that his mind was so affected by the alcohol he had **I**

consumed that he was incapable of knowing that what he was doing was wrong. When a man is charged with murder, we do not think it is a defence for him to say that he does not remember a thing. (Emphasis added.)

[53] Having considered the reasons of the Court of Appeal for making such findings or inferences, we are inclined to agree with it. We are also of the view that the conclusion of the Court of Appeal is more tenable. In coming to such view, we are well aware of the maxim that in the event of doubt it must be given favourably to an accused person (see *Tan Hung Song v Rex* [1951] MLJ 181; *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316; *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40). But this is not the case here. In fact, despite the testimony of witnesses called by the prosecution that the appellant could have been drunk at that time, the learned trial judge went on to find at the close of the case for the prosecution that there was a case to answer for the charge of murder with cl (d) as the mental element. And at the defence stage the allegation of drunkenness was contradicted by the witnesses called by the appellant.

[54] Accordingly, having given the complaint our serious consideration we find no justification in finding that the appellant was unfairly and unjustly prejudiced by such exercise of the Court of Appeal. In fact, the Court of Appeal went on to say that even if accepting the finding of the learned trial judge that the appellant was in an intoxicated state at the material time he was not in such a state that he had no knowledge of what he was doing.

[55] In view of the basis for calling the defence at the end of the case for the prosecution, the rejection of the sole defence of the appellant, namely, automatism by reason of him undergoing a hypoglycaemic episode at the material time and the finding by inference of knowledge as defined in cl (d) of s 300 of the Code both by the learned trial judge (albeit at the close of the case for the prosecution) and by the Court of Appeal, (see *Wong Nam Loi v Public Prosecutor* [1997] 3 MLJ 795; *Tay Kah Tiang v Public Prosecutor* [2001] 2 SLR 305) we have no reason to find that the decision of the Court of Appeal is erroneous in law and in fact.

[56] We have already alluded to that part of the judgment of the Court of Appeal indicating its reasons for concluding 'that the weight of evidence clearly established that the respondent was very much in control of his actions despite the alcohol he consumed.' In fact, it is very much in line with the earlier approach adopted by the learned trial judge when calling for the defence of the appellant. As we have said hereinabove, if the learned trial judge did not retract from his earlier direction in construing the application of cl (d) he could have arrived at the same conclusion as that of the Court of Appeal. We would therefore hold that the Court of Appeal was correct in its approach, the reasons given and thus its decision.

[57] In this instant appeal, the relevant mens rea is covered by cl (d) and we have already expressed our view on the issue. As such, the consideration of 'intention' that confronted the courts in Zambia and the Privy Council does not arise.

[58] For the reasons, we have expressed hereinabove, we are of the view that cl (d) of s 300 of the Code should not have been omitted by the learned trial judge in his overall consideration of the case simply on the basis that intoxication is in issue and s 86(2) could be invoked.

[59] We have also considered the other complaints of the appellant but we do not think our determination on any of them would have altered the conclusion we have arrived at herein.

[60] Accordingly, we find no reason to reverse the decision of the Court of Appeal. This appeal is therefore dismissed and the conviction and sentence passed by the Court of Appeal are hereby affirmed.

Appeal dismissed. Conviction and sentence affirmed.

Reported by John Paul Simon